

## LCS Practice Note

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### Construction Funding

#### *So How Are We Supposed to Pay For This? The Frustrating and Yet Unresolved Saga of Combat and Contingency-Related, O&M Funded Construction*

Usually, when Congress gives the Department of Defense (DOD) money in the middle of a fiscal year, it's a good thing. Unfortunately for the DOD, Congress buried a little land mine in the 2003 Emergency Wartime Supplemental Appropriations Act (EWSAA)<sup>1</sup> that has created much consternation among those seeking legal authority to spend Operations and Maintenance (O&M) funds for construction projects in support of combat and contingency missions.

To understand the DOD's position, it helps to start from the beginning. Under 10 U.S.C. § 2805, the Secretary of a military department may use O&M funds to finance unspecified minor military construction projects only if the complete project costs \$750,000 or less; that limit rises to \$1.5 million if the project is intended solely to "correct a deficiency that threatens life, health, or safety."<sup>2</sup> Unfortunately, even a modest base-camp in a deployed environment often costs more than \$750,000.

On 22 February 2000, in the wake of events unfolding in Kosovo, the Army Deputy General Counsel (Ethics and Fiscal) issued a policy memorandum stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures "are clearly intended to meet a temporary operational requirement to facilitate combat or contin-

gency operations."<sup>3</sup> To qualify for this "combat or contingency exception," a project must have clearly been intended to meet a temporary operational requirement; be intended to facilitate combat or contingency operations; and not designed to satisfy requirements for permanent use at the conclusion of combat or contingency operations (i.e., follow-on operations, future exercises, permanent host nation use, etc.).<sup>4</sup>

For three years, the Army used this doctrine as legal authority to fund contingency and combat-related construction projects costing in excess of the \$750,000 O&M funding cap.<sup>5</sup> Then, on 27 February 2003, the Under Secretary of Defense (Comptroller) issued a policy memorandum clarifying the DOD's position on the use of O&M funds for construction in support of combat and contingency missions.<sup>6</sup> The memorandum authorized the use of O&M funds for such construction where the construction was necessary to meet an urgent but temporary military operational requirement; the construction would not be carried out on a "military installation" as defined under 10 U.S.C. § 2801;<sup>7</sup> and the United States had no intention to use the construction after the operational requirement has been satisfied.<sup>8</sup>

Unfortunately for those wishing to use the DOD Under Secretary's memo as legal authority to fund such projects, Congress quickly acted to reverse the policy by passing the EWSAA. On 16 April 2003, the President signed the legislation.<sup>9</sup> Section 1901 of the EWSAA authorized the Secretary of Defense to transfer up to \$150 million of funds appropriated in the supplemental appropriation to carry out military construc-

1. Emergency Wartime Supplemental Appropriations for Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003) [hereinafter EWSAA].

2. 10 U.S.C.S. § 2805(c)(1) (LEXIS 2003).

3. Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (on file with author).

4. *Id.*

5. About six months after the Army Deputy General Counsel issued this policy memorandum, the General Accounting Office (GAO) issued a report focusing on costs associated with the Balkans Support Contract. Although the report criticized the Army's efforts to reduce costs under the contract, the report failed to raise any objections to the Army's decision to spend O&M funds for construction projects that clearly exceeded the \$750,000 O&M funding threshold. See GEN. ACCT. OFF., REP. No. GAO-00-225, *Contingency Operations: Army Should Do More to Control Contract Costs in the Balkans*, (Sept. 29, 2000) [hereinafter GAO-00-225].

6. See Memorandum, Under Secretary of Defense (Comptroller), subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) [hereinafter Under Secretary Defense Memo] (on file with author).

7. 10 U.S.C.S. § 2801(b)(2). Under this statute:

the term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense.

*Id.*

8. See Under Secretary Defense Memo, *supra* note 6.

tion projects not otherwise authorized by law.<sup>10</sup> Such funds would then be available to the DOD pursuant to the Secretary's authority to carry out contingency construction projects under 10 U.S.C. § 2804,<sup>11</sup> which requires twenty-one day advance notice to Congress. Additionally, section 1901 of the EWSAA further restricted the definition of "military installation" under 10 U.S.C. § 2801 to exclude projects that would previously have been permitted pursuant to the Under Secretary's memorandum.<sup>12</sup> Congress explained that a "military installation" now includes:

not only buildings, structures and other improvements to real property under the operational control [of the United States] . . . but also, any building, structure or real property improvement to be used by the Armed Forces, regardless of whether such use is anticipated to be temporary or of longer duration.<sup>13</sup>

To clarify Congress' intent, the conference report accompanying the supplemental appropriation clearly rejected the policy articulated in the Under Secretary's memorandum, and insisted that the Secretary of Defense use his authority under 10 U.S.C. § 2804 to carry out contingency related construction in the future.<sup>14</sup>

The EWSAA's impact upon the DOD is uncertain. Unfortunately for the DOD, the contingency construction authority provided under 10 U.S.C. § 2804 requires the Secretary of Defense to submit a written report to "the appropriate committees of Congress" on any decision to use this authority.<sup>15</sup> Each report requires "the justification for the project and the current estimate of the cost of the project, and the justification for carrying out the project under this section."<sup>16</sup> The project may then be carried out only after the end of the twenty-one day period "beginning on the date the notification is received by such committees."<sup>17</sup> Arguably, this authority is too cumbersome and inflexible to accommodate the DOD's changing requirements in a contingency or combat environment.

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9. EWSAA, *supra* note 1.

10. *Id.* § 1901.

11. 10 U.S.C.S. § 2804. The statute provides:

(a) Within the amount appropriated for such purpose, the Secretary of Defense may carry out a military construction project not otherwise authorized by law, or may authorize the Secretary of a military department to carry out such a project, if the Secretary of Defense determines that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.

(b) When a decision is made to carry out a military construction project under this section, the Secretary of Defense shall submit a report in writing to the appropriate committees of Congress on that decision. Each such report shall include (1) the justification for the project and the current estimate of the cost of the project, and (2) the justification for carrying out the project under this section. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees.

*Id.*

12. EWSAA, *supra* note 1, § 1901.

13. *Id.*

14. *Id.*

15. 10 U.S.C.S. § 2804.

16. *Id.*

17. *Id.*